

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 577 OF 2001

Vijaykumar alias Rajendra
Manohar Desai, age 28 yrs.
r/o Kari, Tq. Barshi,
District - Solapur.

.. Appellant

VERSUS

State of Maharashtra.

.. Respondent

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Shri Shirish Gupte, Senior Advocate with
Mrs.Sharmila Kaushik, Advocate for the appellant.
Smt.V.R. Bhosale, APP for the respondent State.

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CORAM : N.V.DABHOLKAR
AND
SMT.V.K.TAHILRAMANI, JJ.

DATE : 12TH JANUARY 2006

ORAL JUDGMENT :

(PER DABHOLKAR, J.)

1. Sessions Judge, Solapur tried present appellant for the offences punishable under sections 302, 380 and 177 of the Indian Penal Code by Sessions Case No. 161 of 1999. The case concluded with the judgment and order dated 27th July 2000 by which present

appellant is held guilty of all the three charges. He is sentenced to suffer life imprisonment for the offence punishable under section 302 of the Indian Penal Code; rigorous imprisonment for three years so far as charge under section 380 of the Indian Penal Code and rigorous imprisonment for one year so far as charge under section 177 of the Indian Penal Code is concerned. All the substantive sentences are ordered to run concurrently. The said finding of guilty, conviction and sentence, is under challenge by present appeal under section 374 (2) of the Code of Criminal Procedure.

2. Prosecution story can be summed up as follows :

. The incident in question is said to have occurred on the night between 23rd and 24th June 1999, to be more precise at 02.00 hours on 24.6.1999. The victim of the incident namely Rani was married to appellant / accused on 3rd June 1999. It is the case of the prosecution that at the alleged time, the accused at his residence at village Kari, Tq. Barshi, District Solapur assaulted deceased Rani by using a wooden log and ultimately killed her by throttling. He managed to hide cash of Rs.28,000/- and one gold ornament of the

victim (Ganthan) in the store where Jowar was stored and lodged a false report with Police Station Pangri on 24.6.1999 at 04.15 hours. By the said report (Exh.29) he has reported that cash Rs.28,000/- obtained from one Osman Bashir Bagwan towards sale of sweet lemon orchard which was kept in a cloth bag hung to a peg and gold ornament worn by deceased Rani were stolen by the thieves on that night at 02.00 hours. According to this report, two unknown persons were found standing near the accused and victim when he woke up because of noise of shifting the bags. They were armed with pen knives. There was one person guarding the entrance of the house and the fourth one was trying to open the tin box. According to this report by the accused, he was held at bay at the point of pen knife. It is further reported that at his signal wife Rani handed over the gold ornament but simultaneously uttered that she has identified the thief and upon this, the person who was guarding the entrance, dealt her by means of a piece of wood on her head and also throttled her. He could neither resist nor shout for help because a piece of cloth was stuffed in his mouth and he was held at the tip of a pen knife. He suffered injuries on his both arms as the accused dealt him by wooden piece when he tried to move while one of the thieves was trying to

throttle his wife. According to prosecution, this entire report by the appellant accused was a false report to screen himself from the offence of murder of his wife.

. Head Constable Shaikh of Pangri Police Station registered Crime No. 38 of 1999 on the basis of this report (Exh.29) by the appellant accused. In fact, appellant accused had also given description of the thieves in the said report. A hunt was started for the thieves in the villages near village Kari. Investigating Officer Shri Gajendra Mansawale, P.S.I. visited the place of accused and after drawing inquest, despatched the dead body for post mortem. Panchanama of the scene was drawn. In an attempt to trace out the thieves, sniffer dog was invited. Instead of leading the trace, the sniffer dog kept moving only around the house of accused which gave rise to suspicion in the mind of the Investigating Officer. He, therefore, took appellant accused to Pangri Police Station and interrogated him. He also noticed that there was a nail injury behind right ear of the accused. There were other injuries on the forehead, both hands and both legs. During interrogation Investigating Officer was convinced that the accused has committed murder of his

wife and lodged a false report of theft at his place and thieves having killed his wife.

. It is the claim of the prosecution that during the course of investigation, cash amount of Rs.30,000/- and the gold ornament Ganthan were discovered at the instance of the information given by the accused, from the store of Jowar in the house.

. Upon conclusion of the investigation, charge sheet was filed in the Court of Judicial Magistrate, First Class, Barshi and after committal the accused was subjected to trial and ultimately convicted as described hereinabove.

3. The prosecution, in order to substantiate the charge; has examined seven witnesses. Investigating Officer P.S.I. Gajendra (PW 6) and panch witness Jabbar Rashid Kazi (PW 5), in whose presence the memorandum of the statement of accused was recorded and the cash as also the ornament was discovered, are the most important witnesses in the peculiar set of facts of this case. PW 1 Anil is other panch witness. He has supported the prosecution to the extent of arrest of accused and panchanama drawn on the occasion. He was

also a witness to the memorandum of the statement of accused and discovery at the instance of the accused. He has turned volte face on that part of the prosecution evidence.

. PW 2 Kavira Khune is mother of the deceased and PW 3 Bhagwat is brother of PW 2. Kavira has deposed about deceased Rani not being happy with the accused even during short marital life of three weeks. Bhagwat had been to the place of accused along with his sister Kavira after the incident and his evidence provides no useful material. PW 4 Vijaysinh Vidhate is the neighbour of the accused and he had accompanied the accused to Pangri Police Station when report (Exh.29) was lodged by the accused.

4. During the course of his statement under section 313 of the Code of Criminal Procedure, the accused has maintained the story as propounded by him in the complaint (Exh.29) tendered by him to Pangri Police Station. He has proceeded in saying that the complaint given by him to the police station is correct. Consequently he has admitted his marriage with deceased Rani on 3.6.1999. He has also admitted that he and victim Rani were the only members in the house on the

alleged night. He has denied the allegation levelled by Kavira (PW 2) that Ranibai was subjected to ill treatment during short marital life on account of sexual relationship. He admits to have lodged his complaint with Pangri Police Station on 24.6.1999 to the effect that cash Rs.28,000/- and Ganthan (Mangal Sutra) of Ranibai was stolen by the thieves and the thieves having murdered Ranibai. About other contentions of the prosecution, the same are responded with denial or ignorance by saying "It is not correct" or "I do not know". Thus, it can be said that defence of the accused is of denial regarding his being the assailant causing death of Ranibai and he maintains the theory that Ranibai was killed by the thieves.

5. For the reasons discussed in para 18, by reference to inquest panchanama (Exh.13) and post mortem notes (Exh.23) (both documents were admitted in evidence upon "No Objection" of the defence) as also to some extent relying upon the theory propounded by the accused in his complaint (Exh.29), the learned Judge arrived at a conclusion that the death which was opined to have been caused due to asphyxia by throttling, was homicidal. His reasons for arriving at a conclusion that appellant accused had committed murder of Ranibai,

are discussed by the learned Judge in the remaining part of the judgment from para 19 onwards. Initially, learned Judge reminded himself of the parameters regarding standard of proof in the case of circumstantial evidence. By relying upon the observations of the Supreme Court in the matter of **Sharad Sarada Vs. State (AIR 1984 SC 1622)**, the learned Judge observed that prosecution is obliged to establish all the circumstances with firmness by cogent evidence and all the circumstances taken together should be consistent with the hypothesis of guilt and of conclusive nature and tendency. Those should exclude every possible hypothesis except the guilt of accused and form a complete chain between the crime and the culprit. He also relied upon the principle laid down in the same case that where various links in a chain are not themselves complete, then a false plea or false defence also can be called in aid to lend assurance to the prosecution story.

. By relying upon observations of the Supreme Court in the case of **Faddi Vs. State of Madhya Pradesh (AIR 1964 SC 1850)**, the learned Sessions Judge also took a note of the fact that the first information report lodged by the accused is admissible for the purpose of

proving admissions of the accused. Regarding Exh.29 containing no self-inculpatory material or confessional statement, the learned Sessions Judge was inclined to observe that the same was admissible in evidence in the light of sections 8 and 21 of the Indian Evidence Act.

. Consequently the learned Trial Judge has used the first information report for arriving at a conclusion that the deceased was married to the accused on 3rd June 1999 hardly three weeks prior to the alleged incident and on the day of the incident, accused and victim were the only family members, mother having gone to village Jamgaon about 8 to 15 days prior to the incident and younger brother Balaji having gone to village Chawadi for sleeping to night. From the said complaint it is also evident that one day prior to the incident accused had been to Barshi to a merchant, to whom he sold his orchard and an amount of Rs.28,000/- received by the accused was kept in a cloth bag in the house which was with him on that night.

. In the remaining part of the judgment, the learned Trial Judge by discussing the evidence, has held the prosecution to have proved following circumstances :

1. Only accused and victim were at home at the fateful night.
2. Accused reported theft and killing of his wife by the thieves.
3. Discovery of articles reported to be stolen at the instance of accused and inside his house, which proved his complaint to be false.
4. Injuries on the person of accused were superficial and could be self-inflicted.
5. Ganthan article of the deceased was in possession of the accused soon after the death.

. Consequently, the learned Judge was of the view that a presumption could be drawn in the light of section 114 (a) of the Indian Evidence Act against the accused unless he offered sufficient and acceptable explanation for possession of ornament of the deceased soon after the murder. According to learned Judge, absence of proof of motive was not fatal to the prosecution in the present case and the circumstances cumulatively left no other hypothesis open except that

accused must have murdered his wife. The learned Judge has held the accused guilty for offence under section 177 of the Indian Penal Code because his report is found to be false and for the offence under section 380 of the Indian Penal Code since the Gunthan was removed from the neck of the victim and kept hidden by the accused.

6. Heard Senior Advocate Shri Shirish Gupte with Advocate Mrs Sharmila Kaushik for the appellant and APP Mrs. V.R. Bhosale for the respondent State.

7. The learned counsel for the appellant has taken us through the evidence relevant to his submissions and practically entire judgment which is under challenge. Reminding us of the parameters regarding standard of proof in the cases based on circumstantial evidence, Senior Advocate Shri Gupte urged that evidence regarding discovery at the instance of the accused under section 27 of the Indian Evidence Act is not established by the prosecution beyond reasonable doubt and for the purpose, he has also placed reliance upon the judgment of the Supreme Court in the matter of **Surinder Pal Jain Vs. Delhi Administration (1993 Suppl. Vol. III SCC 681)** which case, according to the learned Senior Advocate, is based on identical

set of facts as the one at hands. According to Senior Advocate Shri Gupte, if the link regarding discovery of the articles at the instance of information given by the accused is broken, the entire prosecution story must fail for simple reason that it does not remain unbroken chain between the crime and the culprit.

. To some extent, he has also assailed the approach of the learned Trial court. According to Senior Advocate Shri Gupte, the Trial Court has approached the appreciation of evidence in the reverse order. Having arrived at a conclusion that the complaint lodged by the accused is false, according to learned Senior Advocate; the Trial Court has held that the prosecution story is true. It was also urged that prosecution has not been successful in providing any motive for which the accused would commit murder of his wife and that further weakens the prosecution case.

. It was also submitted that the injuries on the person of the accused are proved and existence of injuries on the person of accused matches with the theory propounded in his defence that there was theft at his place and more so, in the absence of claim on the part of prosecution that there was any violence between

the accused and the victim. It was submitted that injuries upon the person of the accused ought to have been explained by the prosecution before enabling the Trial Court to arrive at a conclusion that those could have been possibly as a result of violence between the spouses.

8. Firstly, we are unable to agree with the submission of learned Senior Advocate that the Trial Court has approached the matter and more particularly the assessment of evidence in order to consider as to which of the circumstances are firmly established by the prosecution on the basis of cogent evidence, in a wrong manner or rather in a reverse order. It was contended by Senior Advocate Shri Gupte that the Trial Court has started from the other end. It has first arrived at a conclusion that complaint lodged by the accused (Exh.29) about theft at his residence is false and, therefore, the Trial Court has arrived at a conclusion that the prosecution story is true. Such is not the case, in our opinion, upon going through the reasons recorded by the learned Trial Court.

. There is no reason to disagree with the proposition by learned Senior Advocate Shri Gupte

regarding the assessment and evaluation of evidence in the matters based on circumstantial evidence. The prosecution is required to establish each and every circumstance with firmness and cogent evidence. All the circumstances together should form a complete chain between the crime and the culprit. Such a chain should leave no other hypothesis possible except the guilt of the accused. We also do not dispute the submission by learned Senior Advocate that false defence raised by the accused can be considered as one of the circumstances, but for the purpose of lending assurance to the prosecution case based on other circumstances, established by the prosecution on its own. The false defence alleged by the accused by itself would not be sufficient to hold the prosecution story to be true. We disagree with the learned Senior Advocate regarding approach of the Trial Court being wrong, erroneous or in the reverse order.

9. As can be observed from para 12 of the judgment, the prosecution had relied upon as many as seven circumstances and falsity of the complaint by the accused is not at the top of the list of circumstances relied upon by the prosecution. We may enlist the seven circumstances those were pleaded by learned APP before

the Trial Court, although in a shorter form :

- (1) Death of Ranibai within 20 days from marriage on 3rd June 1999.
- (2) Death in the circumstances analogous to "custodial death".
- (3) Recovery of articles reportedly stolen, within a house of accused reporting the theft.
- (4) The amount was received by the accused a day before the alleged incident.
- (5) Injuries on the person of the accused being superficial and possibly by self-infliction.
- (6) Torn Banian of the accused upon which learned APP has tried to develop an argument before the Trial Court that there was scuffle between the accused and the victim.
- (7) Presumption under section 114 of the Indian Evidence Act as a result of recovery of stolen

property from the accused.

10. On going through the reasons recorded by learned Judge what we perceive is that the learned Judge has relied upon only five circumstances and those can be enlisted as follows :-

- (1) Accused and victim being the only members at odd midnight hours at the place of occurrence.
- (2) Accused reporting theft to the police station (which turned out to be a false report).
- (3) Discovery of stolen articles at the instance of accused.
- (4) Injuries upon the person of accused being superficial and possible by self-infliction.
- (5) Presumption under section 114 of the Indian Evidence Act.

. Of our own, we are inclined not to rely upon circumstance at Sr.No.4. The opinion of the Medical Officer that injuries suffered by the accused would be possible by self-infliction does not necessarily lead to an inference that the injuries are self-inflicted. In fact, we do not think that any medical expertise is necessary to consider the possibility of injuries being possible by self-infliction. This is just an observation that the location of the injury on the person is such that his hands can reach that location. For such an opinion, we do not require medical expertise. The second reason for which we do not wish to rely upon the injuries upon the person of the accused to be a circumstance supporting the prosecution case is rather stronger one. On comparison of complaint lodged by the accused about the theft and description of violence that he suffered at the hands of the thieves, as given in Exh.29 with the medical certificate (Exh.36), it can be seen that Exh.29 explains almost all the injuries upon the person of the accused except "C" shaped abrasion 0.5 cm. X 0.2 cm. behind the pinna of right ear. We are not recording a finding that the theory of violence by the thieves with the accused is acceptable. But we may say that the injuries upon the person of the accused, if is a circumstance compatible

with theory of violence with the deceased, it also may match the defence theory of violence at the hands of the thieves. We, therefore, feel that this one is not a circumstance available to the prosecution as firmly speaking about hypothesis of guilt only.

11. Although it was submitted by Senior Advocate Shri Gupte that if the learned APP has relied upon seven circumstances as enlisted in para 12 of the judgment, the Court will have to examine if those circumstances are established and Court need not draw any other inference nor the Court need hold any other thing established, we have clearly indicated our disagreement with Senior Advocate Shri Gupte on this count. We are empowered to and it is our privilege to scan all material available on record as an appellate authority and draw our own inferences. For the purpose, we need not be bounded by the submissions of either side or by the conclusions drawn by the Trial Court. The only restriction we would observe is that our inferences drawn would be based on material available on record and without travelling beyond the material. Merely because one of the circumstances relied upon by learned APP before the Trial Court is held not proved by this Court, that would not cause total failure of the prosecution

case and it will be open for us to consider whether the remaining circumstances which we feel to have been firmly established would make out a complete chain.

12. Having held that the injuries upon the person of the accused is not a circumstance conclusively pointing out towards the guilt of the accused, we rely upon only four circumstances i.e. togetherness of victim and the accused and absence of third person; death admittedly to be homicidal; accused making a false report of theft at his place and discovery at the instance of the accused.

. It may not be exaggeration if we say that accused by sticking to his complaint till the end of the trial, as demonstrated by reply to the last question during the course of his statement under section 313 of the Code of Criminal Procedure, 1973, has made the burden of the prosecution considerably less. We have no hesitation to agree with the view taken by the Trial Court that in the light of sections 8 and 21 of the Indian Evidence Act, the complaint lodged by the accused with the police station (Exh.29) and which stands duly proved by the deposition of Investigating Officer P.S.I. Gajendra can be read in evidence as the narration of

accused as was perceived by the police authorities recording the first information report. It is in the complaint itself that accused and his wife were the only family members on the fateful night. The mother of the accused, who is otherwise the family member, had gone to village Jamgaon to her sister and younger brother namely Balaji had proceeded to Chawadi after dinner, for his bed.

. Death of the victim being homicidal is also not disputed by the defence and if at all any assistance is required, the post mortem notes (Exh.23) which are admitted on record under section 294 of the Code of Criminal Procedure indicate that the death was result of asphyxia due to throttling.

. It is the claim of accused himself that a day before the alleged incident, he had been to Solapur, he sold the sweet lemon orchard and he had returned home with amount of consideration Rs.28,000/-, which was kept in a cloth bag hung to peg. Senior Advocate Shri Gupte repeatedly submitted that the Gunthan being ornament worn by a married woman and cash of Rs.28,000/- having been received by the appellant accused a day prior to the alleged incident, recovery of these articles either

from his residence or discovery from a hidden place at the instance of accused, as an innocuous circumstance which would lead the Court to no inference much less an inference regarding the guilt of the accused. The submission of the Senior Advocate could have been justifiable had there been no report regarding theft of these articles by the accused. It is the report by the accused (Exh.29) that makes this circumstance the strongest circumstance loaded against the accused. These are not the articles which were in the house, according to report of the accused to the police station, Pangri. As per report (Exh.29), the incident of theft during which Ranibai was killed by the thieves, had occurred at about 2 a.m. and the complaint is lodged at 4.15 a.m., within less than three hours. In the complaint, it is reported that cash of Rs.28,000/- and ornament worth Rs.4,000/- were stolen. Ordinarily finding these articles in the house would not be incriminating circumstance but these are the articles found inside the house within further few hours although it is the claim of the accused that those were stolen from his house on that night and during which incident, his wife was killed. On reference to panchanama regarding arrest of the accused (Exh.17), he was arrested on 24.6.1999 (the same day) at 11.30 a.m.

Memorandum of his statement (Exh.26) was registered at 12.15 noon and the articles were discovered at his instance between 12.15 to 12.30 noon. The articles are said to have been discovered from "_____" i.e. earthen container used for storing Jowar.

13. Senior Advocate Shri Gupte has assailed the evidence regarding discovery under section 27 of the Indian Evidence Act with all seriousness. In fact, we are inclined to go one step further than the Trial Court. Presuming for the sake of argument that discovery was not at the hands of the accused, we will have to consider that the articles were recovered from the house of the accused by the police authorities during search of the house or at the time of drawing panchanama of the spot. The spot panchanama (Exh.27) was drawn on 24th June 1999 between 8.15 a.m. to 9.15 a.m. Even if we presume that police officer might have discovered the cash and the ornament in the house, may be in the cloth bag where it was kept by the accused and ornament around the neck of the deceased, that will be sufficient to demonstrate that report regarding theft that was lodged by the accused with the police station at 4.15 a.m. was a false report. Weakness in the discovery evidence in any way would not shake the

inference drawn by the Trial Court that the complaint lodged by the accused turned to be false one.

14. Reliance was placed on the observations in Surinder Pal Jain Vs. Delhi Administration in order to persuade us to take a view that the evidence of the prosecution regarding discovery under section 27 of the Evidence Act, is not reliable. Senior Advocate Shri Gupte has taken us through facts of the reported case and with due respect, we are unable to agree with him that the facts in the reported case and the one at hands are identical. No doubt in the reported case also, the information regarding theft was recorded as an offence under section 460 of the Indian Penal Code at the instance of information given by the husband of the deceased. In that case also there was report regarding missing of ornaments, impliedly suggesting theft of ornaments. In the reported matter also, discovery of ornaments reportedly stolen was claimed at the instance of the information given by the accused. Although the facts are parallel to this extent, on reference to discussion of the reasons for which the discovery under section 27 was disbelieved, we find that we do not have so strong circumstances on record to look to the discovery in the case at hands with suspicion. In the

matter at hands, PW 1 Anil has turned hostile so far as discovery under section 27 of the Evidence Act is concerned. Other panch Jabbar (P:W 5) has supported the prosecution case. Jabbar has also admitted that his evidence is recorded in Solapur Court in two - three matters. Senior Advocate Shri Gupte desired this Court to disbelieve this witness and consequently the fact of discovery at the instance of the accused because there are reasons to feel that Jabbar is a habitual police witness.

. On reference to the reported judgment and more particularly para 27, Hon'ble Court has recorded the reasons for its disbelief expressed about discovery evidence in para 27 and 28. We wish to refer only couple out of those. As observed in para 27, there was abundant material on record to show not only that Harnaik Singh had earlier been cited as a witness by the same Investigating Officer while posted as Sub Inspector at another police station. The two witnesses i.e. panch Harnaik Singh and Sub Inspector had tried to plead before the Court that they do not know each other. In our matter PW 5 Jabbar may be stock witness of the police but he is not stock witness of the Investigating Officer as in the reported matter. There was another

reason to look to the discovery with disbelief as observed in para 20 and this was in the light of contradiction between the witnesses about the manner of discovery. Contrary to what Investigating Officer and other witnesses had stated, panch Harnaik Singh deposed that the ornaments were taken out by Sardarji Investigating Officer from the drain hole and not by the appellant. We must say that the reasons for looking to discovery evidence with disbelief in the reported matter were quite on the stronger side than in the matter at hands and hence we are not inclined to discard the evidence of discovery under section 27 of the Evidence Act in the matter at hands by taking a view similar to the one taken in the matter of Surinder Pal Jain.

15. It must also be said here that the manner of appreciation of evidence in criminal trials and in each case is ordinarily based upon facts and circumstances of the case. The same can not be treated at par with the ratio decidendi laid down by the Court and merely because in the similar fact situation one Court felt the evidence to be unacceptable that may not be applicable in every other case having parallel set of facts. In any case, we have pointed out couple of points of distinction between the matter at hands and

the reported matter.

16. For couple of more reasons, we are not inclined to follow the same line of reasoning as in the reported matter relied upon by learned counsel. In the reported matter, Trial Court was not convinced with the reliability of the discovery evidence. The High Court had taken a different view and the same was disapproved by the Supreme Court. The Supreme Court, therefore, was of the view, as expressed in para 25; that the High Court did not properly appreciate the prosecution evidence while reversing the well considered judgment of the Sessions Judge. In the matter at hands, the Trial Court, which always has benefit to observe the demeanour of the witnesses and, therefore, is at some advantageous position than the appellate Court, has accepted the discovery evidence and deposition of PW 5 Jabbar. Except Jabbar being a panch witness in couple of more cases, no material contradictions as in the reported matter could be pointed out by the learned counsel for the appellant.

17. Lastly, in the reported matter missing articles were the ornaments. Those could be recovered by the Investigating Officer during the course of his

investigation and even before the interrogation. In the matter at hands, there is one ornament and cash of Rs.30,000/-. As a natural course of human conduct, it can not be pleaded, nor it was so pleaded; that cash Rs.30,000/- was planted by the investigating agency. The discovery of cash which was allegedly stolen is much stronger circumstance than discovery of some usual ornaments. If at all the accused desires the Court to believe the story of theft from his dwelling house which he has persisted throughout, some explanation ought to have been given regarding existence of cash about Rs.58,000/- in his house and as to how thieves could lay hand only on part of it.

18. For all the reasons discussed hereinabove, we are not inclined to accept the submission of learned Senior Advocate Shri Gupte that the prosecution evidence regarding discovery of cash Rs.30,000/- and Gunthan at the instance of accused, is not reliable.

19. Once it is held that the cash and ornament were recovered inside the house, it becomes a circumstance heavily loaded against the accused when coupled with the fact that the accused and victim were

the only members in the house. This is because in that circumstance, the complaint (Exh.29) regarding theft and, therefore, all the story propounded in that complaint, falls to the ground as a false story. The Trial Court has rightly believed this as subsequent conduct of the accused as influenced by the facts in issue and when the complaint is held to be false one, all other details that accused lodged complaint; that articles in the house were scattered; that a small wooden piece was also found lying at the location and that at midnight hours some commotion was created by the accused which attracted the inhabitants of the locality, are required to be branded as a planned move on the part of the accused to screen himself from the offence. All these events have taken place immediately after the death of his wife, which being homicidal is undisputed and when accused was in fact obliged to explain the cause of death of the wife, he explained the same with not only a false defence but by preparing a false story and creating false circumstances.

20. Senior Advocate Shri Gupte was justified in saying that the prosecution has not been able to bring on record any motive on the part of the accused for killing his wife. No doubt, mother of the victim

Kavira (PW 2) deposed that her daughter (Rani) had complained about ill treatment at the hands of the accused, on account of sexual relationship between the spouses. But this deposition has come at the costs of contradiction with the contents in the first information report marked "A" (Exh.32) to the effect that deceased was leading a happy life with the husband.

21. So far as injuries upon the person of the accused are concerned, we have already expressed that we are not inclined to rely upon that circumstance as one of the circumstances in the chain. This is because the said circumstance is compatible with both; the prosecution story as also the defence story. But we must record our disagreement with the submission of Senior Advocate Shri Gupte that prosecution was obliged to explain the injuries upon the person of the accused. Existence of injuries upon the person of the accused and its non-explanation on the part of the prosecution assumes importance when occurrence of incident is admitted and the accused pleads exercise of right of his defence. Failure on the part of the prosecution to offer explanation to the injuries on the person of the accused entails adverse inference against the prosecution including that the theory propounded by the

defence is probable. This analogy, we are of the view; can not be borrowed in the matters based on circumstantial evidence. The cases based on circumstantial evidence are the cases wherein prosecution has already surrendered to the Court that it does not have any witness who has seen the occurrence and wherein prosecution prays the Court to derive an inference on the basis of circumstances that none else but the accused alone must have been the cause of death, if that be a case of murder. The injuries upon the person of the accused in such cases and more particularly in the case at hands could have been explained by two persons; (1) the victim and (2) the accused himself. The victim is not available and, therefore, this is a peculiar case wherein the responsibility of explaining the injuries upon his person was also upon the accused which he tried to do but by launching a false complaint at the police station.

22. Taking over all view of the evidence available on record, we are convinced that prosecution has successfully established following circumstances :

(1) Accused and victim were the only occupants of

the house at fateful night;

- (2) Ranibai met homicidal death;
- (3) Accused lodged false complaint for the same (not that accused only took a false defence before the Court) and
- (4) Allegedly stolen articles were discovered at the instance of the accused and within his house only.

. If we consider cumulative effect of the four circumstances firmly established, we are convinced that it leaves no other possibility open except that the accused must have throttled his wife.

23. The learned Trial Judge, for the reasons discussed in paras 27 to 30, has at the conclusion of the trial, held the appellant guilty for offence punishable under section 380 of the Indian Penal Code. We are unable to subscribe to this view taken by the Trial Court. The Trial Court has exonerated the accused of the charge of theft from dwelling house so far as cash amount is concerned because the cash belonged to

accused himself and he could not commit theft of his own property which was in his own possession. But he has held the appellant guilty for theft of Ganthan. We must point out that the Trial Court has accepted the fact that ornament was discovered inside the house only. It has not crossed the threshold of the house. The prosecution story which we are accepting clearly indicates that hiding of Ganthan and cash was part and parcel of the attempt on the part of the accused to explain the death of his wife to police authorities by a false complaint of theft. "Dishonestly", which is one of the ingredients of the offence defined by section 378 of the Indian Penal Code involves causing of 'wrongful gain' to one person and 'wrongful loss' to another person. When the Ganthan might have been removed from the neck of the victim, Ranibai was already dead and there could not have been any element of 'dishonestly' removing the Ganthan from possession of Ranibai, as contemplated by definitions of "dishonestly", "wrongful gain" and "wrongful loss", as contained in sections 24 and 23 of the Indian Penal Code. The charge for the offence under section 380 of the Indian Penal Code is, therefore, unsustainable even while accepting the entire prosecution story as true. We are, therefore, modifying the order of the Trial Court to that extent but

otherwise the appeal fails.

24. The appeal is partly allowed. The conviction and sentence imposed upon the appellant so far as the offence punishable under section 380 of the Indian Penal Code is concerned, the same is quashed and set aside. The finding of guilty, conviction and sentence so far as charges under sections 302 and 177 of the Indian Penal Code are concerned, are confirmed as imposed by the Trial Court. The appeal is thus partly allowed and partly dismissed.

. The Registrar (Judicial) shall ensure that a certified copy of this judgment is furnished to the appellant accused free of costs through prison authorities.

(SMT.V.K.TAHILRAMANI, J.)

(N.V.DABHOLKAR, J.)

January 12, 2006.

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